IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0499

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID W. GUNDERSON,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

DENNIS PAXINOS
Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107-5025

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

JOSLYN HUNT
Chief Appellate Defender
TARYN STAMPFL HART
Assistant Appellate Defender
139 North Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR DEFENDANT
AND APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS
(Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(Cont.)

TABLE OF AUTHORITIES
(Cont.)

TABLE OF AUTHORITIES
(Cont.)

TABLE OF AUTHORITIES
(Cont.)

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Should this Court revisit its holding in State v. Gaither, 2009 MT 391, 353 Mont. 344, 220 P.3d 640, since it conflicts with prior precedent?

2. Did the State present sufficient evidence that the Appellant committed Attempted Sexual Intercourse Without Consent?

3. Did the district court sufficiently consider the Appellant's midtrial complaints against defense counsel?

4. If this Court concludes the Appellant's ineffective assistance of counsel claims are record based, has the Appellant met his burden to prove the claims?

5. Did the district court properly exercise its discretion when it denied the Appellant's motion for a mistrial?

6. Should this Court conduct plain error review of the Appellant's claim that the trial court, sua sponte, should have removed a prospective juror for cause?

8. When considering the jury instructions as a whole, did the district court properly instruct the jury?

9. Did the district court have statutory authority to impose conditions on the Appellant in the event he was released to the community?

STATEMENT OF THE CASE

On July 19, 2007, the State charged Appellant David W. Gunderson (Gunderson) with Burglary and Attempted Sexual Intercourse Without Consent. (D.C. Doc. 3.) The State filed a persistent felony offender notice. (D.C. Docs. 8, 24.)

The day before trial, Gunderson filed a motion to dismiss the charges, or alternatively, specially instruct the jury, alleging the State failed to collect the victim's bedding and have the victim submit to a full rape examination. (D.C. Doc. 51.) Gunderson argued the State should have collected the bedding to show an absence of fighting or resistance and should have required the victim to submit to a rape examination to show that the victim did not have bruises. (D.C. Doc. 51 at 1-2.) The State filed a response, and the court orally denied the motion. (D.C. Doc. 52; 2/19/08-2/21/08 Transcript of Jury Trial [Tr.] at 8.) The court deferred making a decision on Gunderson's request for a special jury instruction. (Tr. at 9.)

During jury selection, Juror Thorson stated that he knows defense counsel, Robert Kelleher, because Thorson works at the Yellowstone County Detention Center and Kelleher visits the facility frequently. The prosecutor asked Thorson if he knew Gunderson. He responded yes but it would not affect his ability to serve impartially. (Tr. at 17.) Prior to exercising peremptory challenges, defense counsel moved the court for a mistrial because the prosecutor established that

Thorson works at the Yellowstone County Detention Center and then asked if he knew Gunderson. (Tr. at 104-05.) The district court denied the motion. The State struck Thorson with a peremptory challenge. (Tr. at 107.)

On the second day of trial, Gunderson stated he was dissatisfied with defense counsel's representation during trial. The court excused the prosecutors and talked with Gunderson and defense counsel. (Tr. at 254-268, attached as App. A.) The court proceeded with the trial without removing Kelleher from the case. (Tr. at 263.)

During the settling of instructions, the court refused two of Gunderson's proposed instructions. (D.C. Doc. 58, Defendant's Proposed Instructions 1 and 2, attached as Apps. B and C.) The jury found Gunderson guilty of both charges. (D.C. Docs. 63, 64.)

On June 16, 2008, Adult Probation and Parole Officer Boyd submitted a presentence investigation report (PSI). (D.C. Doc. 84.) The PSI included a psychosexual evaluation by Michael Sullivan. (Eval. attached to D.C. Doc. 84.) For the Burglary conviction, the court sentenced Gunderson, as a persistent felony offender, to 100 years in prison. For the Attempted Sexual Intercourse Without Consent conviction, the court sentenced Gunderson to life in prison without the possibility of parole since Gunderson was a repeat sexual offender. (6/16/08 Sentencing Transcript [Sent. Tr.] at 23-25; D.C. Doc. 86.)

STATEMENT OF THE FACTS

I. FACTS RELATED TO THE OFFENSES

On July 2, 2007, Stephanie Randall was 24 years old, lived by herself in a ground level duplex in Billings, Montana, and did not own a car. (Tr. at 119-121.) At about 9:30 p.m., she walked to the Rainbow Bar, where she stayed until about closing time. She was not intoxicated. (Tr. at 122, 161.) Stephanie walked home by herself arriving at about 2 a.m. (Tr. at 123-24.)

Stephanie was preparing something to eat when a stranger, later identified as Gunderson, knocked on her door and asked to use her telephone. (Tr. at 133-34.) Stephanie left her screen door shut and untruthfully told Gunderson that she did not have a telephone and immediately shut her door. Stephanie could not specifically recall locking the door but usually did. (Tr. at 134-35.) Stephanie ate and went to bed about a half an hour later. Since it was hot, she slept only in a pair of underwear. Stephanie turned off all of the lights before going to bed. (Tr. at 136-37, 139.)

Stephanie went to sleep but awoke abruptly to somebody getting into her bed, touching her, kissing her on the neck, rubbing her thigh and grabbing at the side of her underwear to pull them off. Stephanie immediately began screaming and grabbed the person's hand, since he had already managed to pull her underwear down about six inches on one side. (Tr. at 140-42.) Stephanie was

frightened, screaming loudly, and ordered the person out of her home. The person was intent on pulling off her underwear. (Tr. at 142-43.)

The unidentified male told her to knock it off. She struggled to get up, but he grabbed her arms and pinned her forearms down so her wrists were near her ears. (Tr. at 143.) Stephanie continued to fight and scream until she finally managed to turn on the bedroom light near her bed. She recognized her attacker as Gunderson, the man who had asked to use her phone. (Tr. at 144.) Gunderson was wearing pants but no shirt and no shoes. Gunderson pushed Stephanie back to the bed, but she again managed to get up, picked up his shoes and ran to her front door. The door was locked. Stephanie unlocked and opened the door, and threw the shoes out, hoping Gunderson would follow. Stephanie scratched Gunderson on his neck and upper body. (Tr. at 146-47, 151)

Stephanie continued to struggle with Gunderson to get him out of her apartment. (Tr. at 148.) Gunderson had dropped his shirt inside her apartment and pushed back inside to get it. After retrieving his shirt, Gunderson fled. (Tr. at 148.) Stephanie was frightened that Gunderson was going to rape her. (Tr. at 148.) When Gunderson finally fled, she locked the door and windows and called her friend Darrell Jager. (Tr. at 149.)

Jager received Stephanie's call at about 2:30 a.m. (Tr. at 174.) Stephanie was crying and so upset it was difficult to understand her. Based upon what she

said, he feared for her safety and instructed her to call 911. She hung up and did so. (Tr. at 153, 175; State's Ex. 8, Recording of 911 call.) As Stephanie was waiting for the police, she noticed she had a small amount of blood on her hand and what looked to be blood and skin under her nails. She was disgusted by it, but forced herself not to wash her hands, because she knew it might help the police identify her attacker. (Tr. at 149-50.)

When Officer Wichman of the Billings Police Department got to Stephanie's apartment, Stephanie was very distraught, and her hands were shaking profusely. Stephanie showed him a blood smear on her hand and pointed out that she might have something under her fingernails from scratching her attacker. (Tr. at 176, 178, 182-83.) Later, Detective Paharick took a swab of the blood smear as well as fingernail scrapings. (Tr. at 191, 201, 205-06.)

Officer Wichman tried to lift fingerprints from Stephanie's apartment without success. Stephanie did not appear to have any injuries, and she declined medical attention. (Tr. at 184, 189.) Officer Wichman has investigated about 50 sexual assault cases, and in about half of the cases, victims had no visible physical injuries. (Tr. at 189.) Officer Wichman examined Stephanie's bedding for blood spots, but did not observe any. (Tr. at 194.) He did not take the bedding into evidence, because Gunderson was not successful in having intercourse with

Stephanie. Thus, there was no reason to believe there would be seminal fluid on the sheets. (Tr. at 190.)

When Detective Paharick took swabs and fingernail scrapings from Stephanie, Stephanie did not appear to be intoxicated. (Tr. at 207.) Detective Paharick confirmed that Stephanie did not have bruising or other physical injuries but did not find this unusual. (Tr. at 207.) Since Stephanie did not report penetration he did not send her for a rape examination since the examination is very intrusive. (Tr. at 209-10.) Stephanie subsequently identified her attacker as Gunderson through a photographic lineup. (Tr. at 210.)

Meanwhile, Officer Ross received a dispatch that a burglary suspect had fled the scene. (Tr. at 223.) Driving towards the crime scene, he saw two males, one of whom matched the physical description of the suspect. Officer Ross stopped and identified the males as Michael Reynolds, and Gunderson. (Tr. at 226-7.) Officer Ross immediately noticed that Gunderson was sweaty but Reynolds was not. Gunderson also had bright, fresh scratches on his neck. Gunderson volunteered that he had gotten in a fight at the Crystal Lounge. (Tr. at 228-29.)

According to Reynolds, he did not know Gunderson. (Tr. at 287.) At about 2 a.m., he was hanging out with a buddy near the Rescue Mission. Reynolds and his buddy talked for about 30 minutes, and near the end of that time, Gunderson showed up. It looked as if Gunderson had been in a fight. Gunderson told

Reynolds he got in a fight at the Crystal Bar and was just heading home. The two walked together about five minutes before Officer Ross stopped. (Tr. at 286-88.)

Officer Ross read Gunderson his rights. Gunderson first told Officer Ross that he had been at the Crystal Bar where he got in a fight. He left the Crystal and went to the Rescue Mission where he hung out with a guy named Justin. Gunderson did not know Justin's last name. Gunderson claimed he just hung around the Rescue Mission smoking until right before Officer Ross approached him. (Tr. at 233.)

Gunderson told Officer Ross he lived at 2620 Cook, and a friend gave him a ride from there to the Crystal. (Tr. at 234, 244.) When Officer Ross asked for the friend's name, he then said he took a taxi to the bar but jumped out without paying. Gunderson stated he arrived at the Crystal at about 1:30 a.m. and left because a bouncer kicked him out. (Tr. at 234.)

Gunderson denied knowing Mike Reynolds. When Officer Ross told him that was the guy he was just walking with, Gunderson said he had just met the guy and only knew him by his street name- -Justin. (Tr. at 235.) Gunderson denied any knowledge of a burglary or a sexual offense. He assured Officer Ross that his DNA would not be at any crime scene. (Tr. at 235.)

During the evening of July 2 and 3, 2007, Brian Sanderson was the only bouncer on duty at the Crystal. If a fight breaks out, he stops it. Sanderson did not

kick anyone out on July 2-3, 2007. (Tr. at 292-93.) He did not see Gunderson at the Crystal that evening, which he knows was a slow evening. On the nights Sanderson worked, he never had a physical fight break out in the bar. (Tr. at 294.) If another employee at the Crystal asked someone to leave, Sanderson would have been made aware of it. (Tr. at 294, 301.)

Bob Young owns Billings Yellow Cab. The company requires a rider's fare be paid in advance. (Tr. at 273, 275.) Young reviewed the business records for the evening of July 2, 2007 into the early morning hours of July 3, 2007. His drivers gave two rides from the Crystal Bar. One of the rides occurred at 1:33 a.m. from the Crystal Bar to 920 Miles. The other ride occurred at 2:01 a.m. from the Crystal Bar to Third and Burlington. There are no records of anyone hailing a cab outside the Crystal Bar or from the 2600 block of Cook Avenue, and there are no records of a patron running from the cab without paying. (Tr. at 277.)

Barry Willson works for City Cab Company and owns the parent company. The company requires fares up front. If a customer gets away without paying, the driver makes certain the non-payment gets written in the logs and calls the police immediately. (Tr. at 306, 308, 317.) If one of the cab drivers picks up a customer off of the street, the driver always notifies the dispatcher. (Tr. at 307.) Willson reviewed the company's dispatch logs from July 2, 2007 starting at 11 p.m. through July 3, 2007 ending at 4 a.m. and confirmed there were no fares within six

blocks of the Crystal Bar or in the area of the 2600 block of Cook Avenue. There was nothing indicating that any rider ran without paying. (Tr. at 310.)

Joseph Pasternak is a DNA analyst with the State Crime Lab. He examined swabs taken from Stephanie's right hand, a swab of the fingernail scrapings and bucal swabs taken from both Stephanie and Gunderson. (Tr. at 362, 367.) He located a mixed DNA profile in the swab taken from Stephanie's right hand. The mixed profile was consistent with coming from at least two individuals. (Tr. at 371.) The major DNA profile in the mixture was Gunderson's. (Tr. at 373.) If Pasternak was to sample a pool, he would expect, on average, to find a profile matching the major profile, one in forty-two quintillion, three hundred ninety quadrillion samples. (Tr. at 374.) The minor profile was consistent with Stephanie's DNA. (Tr. at 373.)

Pasternak also found a mixed DNA profile in the fingernail scrapings, and the DNA profiles of Gunderson and the victim could not be excluded. (Tr. at 375-76.) If Pasternak were to sample a pool, on average, he would expect to find one in 255,500 people that were Caucasian who would have a DNA profile that could be included in the mixed sample identified from the fingernail scrapings. (Tr. at 377.)

At trial, Gunderson maintained that in the early morning hours of July 3, 2007, he took a taxi from 2620 Cook Avenue to within two blocks of the Crystal.

(Tr. at 394, 408-09.) Gunderson said he got kicked out of the Crystal between 1:30 and 1:45 a.m. and got into a "pushing match" right outside the door. (Tr. at 393, 407.)

After leaving the Crystal, Gunderson ended up at a car wash drinking with a friend, when he saw Stephanie walk by. He thought he knew Stephanie from the Rainbow Bar, so after she entered her apartment, he knocked on her door and asked to use the phone. (Tr. at 395-96.) He admitted that using the phone was a ruse. (Tr. at 443.) Stephanie responded that she did not have a phone and shut the door. (Tr. at 395.)

About 30 minutes later, Gunderson decided to go back to Stephanie's apartment and "kick it" with her. (Tr. at 397.) He opened the screen door to Stephanie's apartment and claimed that the inside door was open about six inches. He said he knocked, stepped inside and called, "Hey, is anybody here?" He heard what sounded like a voice from another room so he turned on the light, went down the hallway and the next thing he knew he was standing in the middle of Stephanie's bedroom. There was a person lying in the bed, but at first he thought it was a guy. (Tr. at 398.)

Gunderson sat down on the bed and kicked off his shoes because his shoes were new, his feet hurt and were sweating, and he did not want to put his shoes on the bed. (Tr. at 399.) Gunderson said he put his hand on Stephanie's hip "by the

kidney" and then moved it down to her leg. Stephanie rolled over and asked what he was doing in her house and he told her that he came over to "bullshit" with her. Stephanie responded in an angry and aggressive manner, got of the bed and turned on the light and went down the hallway, while he just remained on the bed. (Tr. at 399-400.)

Gunderson said Stephanie was naked but might have been wearing panties. Stephanie returned to the bedroom, grabbed his shoes, at which time he stood up. Stephanie went back down the hallway with his shoes, and he followed her. Stephanie told him to "get the fuck out of my house." She threw his shoes onto the doorstep. Gunderson went to leave but realized that he did not have his shirt. He saw it lying between the hallway and kitchen so he stepped back inside and grabbed it. When he was on his way back out, Stephanie grabbed him by the side of his neck and tried to grab his hair. (Tr. at 401-02.) Gunderson claimed that before that, Stephanie had not struck him or physically attacked him in any way. (Tr. at 402.) Gunderson denied touching any sexual part of Stephanie's body or entering her apartment with the purpose of having sex with her. (Tr. at 402.)

Gunderson admitted that he was dishonest when he spoke to Officer Ross, but maintained that he was involved in some altercation at the Crystal Bar and the bouncer kicked him out. (Tr. at 405.) He also maintained that he took a cab to the Crystal, despite neither cab company having a record of it. (Tr. at 409.)

Gunderson volunteered that he may be confused about some things because, he had been in jail for seven and a half months. (Tr. at 408.)

II. FACTS RELATED TO TRIAL

A. Gunderson's Complaint Regarding Prospective Juror Jensen

During voir dire, defense counsel asked Juror Jensen what her decision would be if she had to decide the case right now. (Tr. at 76-79, attached as App. D.) Jensen initially responded guilty but quickly clarified that after thinking about it, she did not have any evidence before her and would have to vote not guilty. (Tr. at 77.) Jensen assured defense counsel she could keep a fair and open mind about Gunderson's guilt or innocence. (Tr. at 78.)

Defense counsel remarked that it seemed Jensen might be more prone to think Gunderson was guilty because the State has charged him with crimes. Jensen said she probably had more of a bias in that direction but she would try not to let it affect her, and she would, instead, listen to the evidence. (Tr. at 78-79.) Defense counsel asked Jensen if she were in Gunderson's place would she want a juror like herself sitting on the jury. She responded yes because she would be fair. (Tr. at 79.) Defense counsel used a peremptory challenge to strike Jensen. (Tr. at 106-07.)

B. Gunderson's Midtrial Complaint Regarding Defense Counsel

On the second day of trial, Gunderson informed the court that he did not feel his attorney "did a proper investigation" for his defense. (Tr. at 254; App. A.) Gunderson was unhappy with defense counsel's cross-examination of the victim. (Tr. at 255, 260.)

Kelleher explained that when he and his investigator interviewed the victim, they asked her if Gunderson succeeded in pulling off her underwear. She responded, "No, I made sure it stayed on." (Tr. at 260.) Kelleher did not view the victim's statement as inconsistent with her testimony and did not think attacking her credibility on this point was sound strategy. (Tr. at 261.)

Gunderson also believed that there was a cab driver who would support his claim that he took a taxi downtown. (Tr. at 256.) Kelleher responded as follows:

> And we were trying to track down the Yellow Cab driver. I just spoke with the owner of the cab company, and he – he's going to testify today that he has dispatch logs which do not show that a cab was dispatched to the twenty hundred block of Cook Avenue on that night. But apparently there is a driver that is similar in description to the one that Mr. Gunderson recalls giving him a ride and we're trying to locate him.

(Tr. at 257-58.)

Gunderson said he had concerns about defense counsel's representation for a long time but never wrote a letter to the court, because he was told not to. (Tr. at

259.) The court asked Gunderson what he would like the court to do. Gunderson responded that he did not know, but he did not want to "waive no rights." (Tr. at 260, 262.) Gunderson asked the court if he asked for Kelleher to be dismissed if that would mean starting over. The court said that was a possibility. Gunderson said he would leave the decision for the court to make. (Tr. at 262-63.)

After considering Gunderson's two claims, and Kelleher's explanations, the court decided to proceed with trial and gave Gunderson the option of proceeding with Kelleher or representing himself with Kelleher as standby counsel. (Tr. at 263-265.) The court agreed to give the defense some additional time to locate potential witnesses if necessary. The court explained that the complaints Gunderson made about Kelleher did not rise to the level of further consideration for removing him from the case. (Tr. at 266, 268.)

III. FACTS RELATED TO SENTENCING

On June 16, 2008, Officer Boyd submitted his PSI, which includes Sullivan's attached evaluation. (D.C. Doc. 84 and attached Eval.) The PSI detailed Gunderson's lengthy criminal history, including prior convictions for Lewd and Lascivious Acts Upon a Child, Aggravated Assault, and Sexual Intercourse Without Consent. (D.C. Doc. 84 at 2-4.) Officer Boyd noted the instant offense occurred six weeks after Gunderson was released to the suspended

portion of his 1994 sentence on a rape conviction. (D.C. Doc. 84 at 4.) Gunderson told Officer Boyd that he had done nothing wrong in this case other than using bad judgment. (D.C. Doc. 84 at 7.)

In a 2002 Sex Offender Report authored by Dr. Scolatti, he wrote that Gunderson's "history is horrendous and his risk assessments do not bode well for the future. . . ." (D.C. Doc. 84 at 8.) In Sullivan's 2008 psychosexual evaluation, he categorized Gunderson as a high risk Level III sexual offender, who meets the definition of a sexually violent predator. (Eval. attached to D.C. Doc. 84, at 18.) Sullivan concluded, "It is not likely that Mr. Gunderson will ever be safe if released into the community. Unfortunately, there are some individuals who simply are not treatable and will continue to present as a high risk to vulnerable persons. That appears to be the case with Mr. Gunderson." (Eval. attached to D.C. Doc. 84, at 19.)

In the recommendation section of the PSI, Officer Boyd writes:

> Since 1970 the state of Montana has attempted every form of rehabilitation possible with this individual. His Correctional file is full of certificates of completion of substance abuse programs, mental health programs, and successful completion of both phases of Sex Offender Treatment. Yet, each time he is released into the community, Mr. Gunderson creates more victims.
>
> . . . .
>
> If there has ever been a case for a life sentence, Mr. Gunderson represents it. No community can be protected from this individual and the line of victims needs to stop now.

(D.C. Doc. 84 at 9-10.)

The court reviewed Montana's sentencing policies and practices as well as all of the information presented in the PSI and Sullivan's evaluation. (Sent. Tr. at 12-22.) The court then imposed sentence for the Burglary conviction and in so doing explained:

> On the burglary charge, there is normally a 20-year maximum penalty. But with the persistent felony offender notice, pursuant to Section 46-18-502, your sentence can be up to 100 years, and that will be the sentence of this Court, that you shall spend 100 years in prison for that charge.

(Sent. Tr. at 23.) For the Sexual Intercourse Without Consent conviction, the court sentenced Gunderson to life in prison without the possibility of parole. (Sent. Tr. at 25.) The court remarked that it had never seen another defendant eligible for a life sentence more deserving of such a sentence than Gunderson and concluded:

> I designate you a Level 3 sex offender, that's the highest level. I believe that your past actions indicate that if there was any chance that you would get out of prison, it would virtually guarantee that there would be more victims, and I will not be a party to that. And this community, in any community, in this case, or in the United States should not have to be subjected to more of your crimes.

(Sent. Tr. at 25.)

SUMMARY OF THE ARGUMENT

This Court should revisit its holding in Gaither, because it conflicts with prior precedent and leads to the unjust result of non-persistent felony offenders being subjected to greater sentences than persistent felony offenders.

The State sufficiently proved that Gunderson acted upon his intent to rape Stephanie and only failed because of Stephanie's actions.

The court correctly denied Gunderson's motion for mistrial, because Juror Thorson's knowledge of Gunderson was not expressed negatively and did not taint the jury panel. The court made an adequate inquiry into Gunderson's mid-trial complaints against his counsel. Gunderson failed to prove any of his ineffective assistance of counsel claims.

There are no grounds for plain error review and the district court correctly instructed the jury in all regards.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews criminal sentences that include at least one year of actual incarceration for legality only. State v. Giddings, 2009 MT 61, ¶ 42, 349 Mont. 347, 208 P.3d 363. The Court reviews a claim that the evidence is insufficient to support the verdict to determine whether, viewing the evidence in the light most

favorable to the prosecution, any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Fish, 2009 MT 47, ¶ 27, 349 Mont. 286, 204 P.3d 681, citing State v. Black, 2003 MT 376, ¶ 29, 319 Mont. 154, 82 P.2d 926.

This Court reviews a district court's decision to deny a mistrial for abuse of discretion. Giddings, ¶ 42. The Court reviews jury instructions for an abuse of discretion. State v. Gaither, 2009 MT 391, ¶ 30, 353 Mont. 344, 220 P.3d 640, citing State v. Field, 2005 MT 181, ¶ 16, 328 Mont. 26, 116 P.3d 813.

Absent an abuse of discretion, this Court will not overrule a district court's ruling on a request for substitution of counsel, which is within the sound discretion of the district court. State v. Hendershot, 2007 MT 49, ¶ 19, 336 Mont. 164, 153 P.3d 619, citing State v. Gallagher, 2001 MT 39, ¶ 4, 304 Mont. 215, 19 P.3d 817 (Gallagher II). Ineffective assistance of counsel claims are mixed questions of fact and law that this Court reviews de novo. State v. Crosley, 2009 MT 126, ¶ 27, 350 Mont. 223, 206 P.3d 932, citing State v. Herrman, 2003 MT 149, ¶ 18, 316 Mont. 198, 70 P.3d 738.

II. THIS COURT SHOULD REVISIT ITS RECENT DECISION IN GAITHER BECAUSE IT CONFLICTS WITH PRIOR PRECEDENT.

Gunderson argues, pursuant to this Court's holding in State v. Gaither, 2009 MT 391, that once the district court decided to sentence him as a persistent felony

offender, pursuant to Mont. Code Ann. § 46-18-502, the maximum sentence it could impose, in total, despite the number of convictions, was 100 years. Although the language in Gaither appears to support Gunderson's position, the State respectfully requests this Court revisit the holding in Gaither for three reasons. First, it is in conflict with this Court's prior precedent, and in Gaither the Court did not discuss, distinguish or overrule the prior precedent. Second, the existing sentencing practices are founded on this Court's prior precedent. Finally, if the Court stands by its holding in Gaither, then repeat, persistent felony offenders who have committed more than one offense in a criminal proceeding will be eligible for a lesser sentence than non-repeat, non-persistent felony offenders.

In Gaither, this Court observed that the State argued the sentence available under the persistent felony offender statute (PFO) can be applied to specific crimes in order to augment the overall sentences available for a defendant being sentenced for more than one felony. Gaither, 2009 MT 391, ¶ 52. The Court then stated:

> We have not yet considered whether Mont. Code Ann. § 46-18-502(2), permits a district court to impose a sentence for a term of imprisonment exceeding 100 years in cases where a defendant is being sentenced as a PFO and has been convicted of multiple felonies in a single proceeding. See State v. Robinson, 2008 MT 34, n.1, 341 Mont. 300, 177 P.3d 488.

Gaither, 2009 MT 391, ¶ 53. The State respectfully submits, however, that the Court had already considered that issue back in 1984 in its decision of State v.

Watson, 211 Mont. 401, 686 P.2d 879 (1984), and in 1991 in its decision of State v. Fitzpatrick, 247 Mont. 206, 805 P.2d 584 (1991).

In Watson, the defendant, Watson, was convicted of Attempted Deliberate Homicide, Aggravated Assault and Burglary. The sentencing court designated him a dangerous offender and a persistent felony offender and sentenced Watson to 100 years imprisonment **on each count**, to run consecutively, without the possibility of parole. Id., 211 Mont. at 404, 686 P.2d at 880.

On appeal, Watson argued it was cruel and unusual to sentence him to 300 years without the possibility of parole, especially in light of his serious mental disorder. Id., 211 Mont. at 404, 686 P.2d at 880. In rejecting Watson's claim, this Court stated, "The term of 300 years is within the statutory maximum allowable for a persistent felony offender." Id., 211 Mont. at 420, 686 P.2d at 889, citing Mont. Code Ann. § 46-18-502(2); State v. Metz, 184 Mont. 533, 536, 604 P.2d 102, 104.

In Fitzpatrick, the defendant, Fitzpatrick, was incarcerated at the Yellowstone County detention facility following a plea of guilty to Deliberate Homicide, Aggravated Kidnapping and Robbery. Fitzpatrick escaped from the detention facility and then broke into a local school, stealing clothing and other small items. Fitzpatrick pled guilty to Escape and Burglary. Fitzpatrick, 247 Mont. at 207, 805 P.2d at 585.

At sentencing, the parties stipulated that the procedural requirements for persistent felony offender "designations" had been met. The State recommended the court impose a sentence of 100 years for each conviction. Fitzpatrick requested a ten-year sentence on each conviction. The district court sentenced Fitzpatrick as a persistent felony offender and sentenced him to ten years for the escape **plus** an additional 100 years as a persistent felony offender and five years for the burglary **plus** an additional 100 years as a persistent felony offender. Id.

On appeal, this Court considered whether the district court sentenced Fitzpatrick to terms exceeding the statutory maximum for a persistent felony offender. Id. In deciding that issue, the Court stated:

> Clearly, § 46-18-502, MCA, provides for a maximum term of 100 years for a persistent felony offender, not an additional term of 100 years, as imposed by the District Court in this case. The sentencing parameters of § 46-18-502, MCA, replace the maximum sentence prescribed for the offense. It is not a sentence in addition to the sentence.

Id., 247 Mont. at 208, 805 P.2d at 586. This Court explained the practical impact of its decision by stating:

> Here the district court could have sentenced Fitzpatrick to serve a maximum of 100 years for the escape and 100 years for the burglary under § 46-18-502, MCA.

Id., 247 Mont. at 208, 805 P.2d at 586.

The Court additionally elaborated:

> In this case, the District Court first entered the judgment and sentenced Fitzpatrick on the escape charge, designating him a persistent felony offender on that charge. It then entered judgment and sentenced him on the burglary charge, designating him a persistent felony offender on that charge. Therefore, even though only a number of minutes had elapsed between the two convictions, Fitzpatrick was a persistent felony offender at the time he was sentenced in the burglary charge, bringing him under subsection (2) of the persistent felony offender statute. When a defendant is sentenced under subsection (2), the sentence imposed must run consecutively to any other sentence. Section 46-18-502(4), MCA. Thus, subsection 4, requires that any sentence imposed by the District Court on remand run consecutively.

Id., 247 Mont. at 209, 805 P.2d at 586.

Additionally, in State v. McQuiston, 277 Mont. 397, 922 P.2d 519 (1996), overruled in part by State v. Herman, 2008 MT 187, 343 Mont. 494, 188 P.3d 978, this Court again explained:

> The Court mistakenly treated the persistent felony offender designation as an enhancement tool. That designation apparently does not enhance the sentence, but simply affords the court **the right to impose a sentence in excess of the maximum allowed from the crimes for which a Defendant is convicted.**

Id., 277 Mont. at 407, 922 P.2d at 526 (emphasis added). In McQuiston, the Court specifically referenced "crimes" in the plural and did not indicate that the PFO designation could only be used once per proceeding.

Watson and Fitzpatrick hold that the persistent felony offender designation can be applied to more than one felony conviction originating from the same criminal proceeding. For nearly two decades, sentencing courts have relied upon

these decisions. Presumably, courts have sentenced a large number of persistent felony offenders in the manner Watson and Fitzpatrick authorize. Therefore, this Court should revisit its holding in Gaither to address these prior cases, or district courts sentencing persistent felony offenders convicted of multiple offenses will be left to resolve the conflict individually, and perhaps inconsistently. The conflict in precedent created in Gaither also needs to be resolved to address the inevitable tide of postconviction and habeas claims Gaither will generate.

Although it is possible the State has misapprehended the effect of this Court's decision in Gaither, the State interprets the Court's holding in Gaither to mean that in some circumstances, such as those in Gaither and in the instant case, it is more favorable for a defendant to be sentenced as a persistent felony offender than not. For example, in Gaither, the defendant was convicted of Attempted Sexual Abuse of Children and Criminal Endangerment. Thus, if the court did not sentence him as a persistent felony offender, the maximum sentence the court could impose was 100 years for Attempted Sexual Abuse of Children and ten years for Criminal Endangerment. According to this Court's rationale in Gaither, however, the maximum sentence Gaither could receive on remand, if the court sentenced him as a PFO is 100 years. Gaither, 2009 MT 391, ¶¶ 54-55.

Applying the holding of Gaither to the instant case, as a persistent felony offender, Gunderson could receive a maximum 100-year sentence. Without the

PFO designation, the court can impose a life sentence without parole for Attempted Sexual Intercourse Without Consent and 20 years for Burglary.

This Court has long held that, "increasing the sentence of a persistent felony offender is entirely consistent with the constitutional mandate that 'Laws for the punishment of crime shall be founded on the principles of prevention and reformation.'" State v. Maldonado, 176 Mont. 322, 330, 578 P.2d 296, 301 (1978). It therefore seems nonsensical that if a defendant who qualifies as a persistent felony offender is convicted of multiple felonies that the maximum sentence the defendant can receive is capped at a single 100-year sentence. Gunderson's case perfectly illustrates this point. Gunderson is a persistent felony offender in every sense of the word. Any of the professionals who had something to say about Gunderson's sentence agreed that he should never be back in the community because he is an unmitigated danger to community safety.

Perhaps a 100-year sentence will be sufficient to keep Gunderson in prison for the rest of his life, but the same could be said in Watson and Fitzpatrick. Yet in both of those cases, this Court authorized 100-year persistent felony offender sentences on each count, and in Fitzpatrick, the Court made it clear that on remand, the district court must run the sentences consecutively. The Court's holdings in Watson and Fitzpatrick comport with Montana's sentencing policy of protecting the public, reducing crime, and increasing the public sense of safety by

incarcerating violent offenders and serious repeat offenders. See Mont. Code Ann. § 46-18-101(2)(b).

In the event this Court declines to revisit its holding in Gaither, the State requests that the Court remand the matter for resentencing to give the district court the opportunity to not designate Gunderson as a PFO and sentence him accordingly.

III. THE STATE PRESENTED SUFFICIENT EVIDENCE OF ATTEMPTED SEXUAL INTERCOURSE WITHOUT CONSENT.

Pursuant to Mont. Code Ann. § 45-5-103(1):

> A person commits the offense of attempt when, with the purpose to commit the specific offense, the person does any act toward the commission of such offense.

Pursuant to Mont. Code Ann. § 45-5-503(1), a person commits the offense of Sexual Intercourse Without Consent when that person "knowingly has sexual intercourse without consent with another person." Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of Attempted Sexual Intercourse Without Consent.

Gunderson admittedly watched from a distance as Stephanie entered her apartment alone at around 2 a.m. He also admitted that he came up with the ruse of asking her to use her phone as an excuse to go to her apartment. After she declined his request and shut her door, he waited around 30 minutes, about the

time it took Stephanie to eat something, get ready for bed, go to bed and fall asleep. Gunderson returned to Stephanie's apartment and unlawfully entered it. Gunderson was not wearing his shirt, locked the door behind him and removed his shoes.

He entered Stephanie's bedroom, where she was asleep on her bed with the lights out. Gunderson, upon his own admission, touched Stephanie on the hip and slid his hand down her leg. According to Stephanie, she awoke abruptly to someone kissing the back of her neck and pulling down her underwear. Stephanie immediately began to scream and struggle, but Gunderson still managed to pull one side of her underwear part way down. Gunderson would not let Stephanie off the bed and, at one point, had her forearms pinned to the bed with her wrists near her ears.

Gunderson was not successful in pulling off Stephanie's underwear, and was not successful in his attempt to rape her, only because Stephanie was determined to not allow him to do so. She kicked, screamed and struggled until she managed to get off of the bed and turn on the light. Once she turned on the light, she immediately recognized Gunderson as the guy who had come to her door earlier. Stephanie could now identify her attacker. Stephanie grabbed Gunderson's shoes, ran down the hallway to her front door, unlocked the door that Gunderson said he had entered, and threw the shoes outside, hoping Gunderson would follow.

Stephanie pushed at him, pulled his hair and scratched the side of his neck before he finally fled.

Notably, Mont. Code Ann. § 45-4-103(2) provides:

> It shall not be a defense to a charge of attempt that because of misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

In the instant case, Gaither clearly misapprehended Stephanie's strength and determination to protect herself, but Stephanie's ability to thwart Gaither's attempt to rape her did not negate all of the affirmative steps he took to do so.

IV. THE DISTRICT COURT SUFFICIENTLY CONSIDERED GUNDERSON'S MID-TRIAL COMPLAINTS ABOUT DEFENSE COUNSEL

Generally, when a criminal defendant makes a pretrial request for appointment of substitute counsel in conjunction with allegations of ineffective assistance of counsel, this Court requires the district court to make an adequate initial inquiry into the nature of a defendant's complaints to determine if those complaints are "seemingly substantial." State v. Gallagher, 1998 MT 70, ¶ 15, 288 Mont. 180, 955 P.2d 1371 (Gallagher I). Gunderson did not make a pretrial request, nor did he specifically ask for a new attorney. Nonetheless, the district court made an adequate initial inquiry into the nature of Gunderson's complaints,

correctly concluded the complaints were not "seemingly substantial" and proceeded with trial.

Gunderson made two complaints against Kelleher. He first argued that Kelleher did not sufficiently cross-examine the victim because he did not impeach her with her prior statement that he did not successfully remove her underwear. Kelleher explained he made a tactical decision not to do so, because it really was a matter of semantics. In the victim's prior statement, she indicated that Gunderson did not successfully remove her underwear because she physically fought to prevent him from doing so. She still maintained, however, that he grabbed her underwear and managed to pull down one side. Kelleher made a reasonable, strategic decision in this regard.

Gunderson next complained that Kelleher had not located certain witnesses. Gunderson maintained there was a cab driver who could verify that on the night in question he took a cab from near his house to the Crystal Bar and jumped out of the cab without paying, and a bouncer who could verify he kicked Gunderson out of the Crystal Bar. Gunderson believed the cab driver's and bouncer's testimony would bolster his credibility. Kelleher explained that, even though his investigator was still trying to locate the unidentified cab driver, the business records from the cab companies did not support Gunderson's story. Defense counsel similarly could not locate the bouncer, which was understandable since the bouncer who was

on duty did not support Gunderson's claim. Defense counsel cannot create witnesses out of whole cloth. Based upon the trial testimony, it is unlikely that any such witnesses existed.

The district court correctly concluded that Gunderson's complaints against defense counsel were not seemingly substantial.

V. IF THIS COURT FINDS GUNDERSON'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE RECORD BASED, GUNDERSON FAILED TO MEET HIS BURDEN UNDER STRICKLAND.

Article II, Section 24 of the Montana Constitution and the Sixth Amendment of the United States Constitution guarantee a person the right to effective assistance of counsel. When this Court reviews ineffective assistance of counsel claims, it uses the two-part test set forth in Strickland v. Washington, 466 U.S. 668 (1984). State v. Crosley, 2009 MT 126, ¶ 54, citing, State v. Kougl, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095. Pursuant to the Strickland test, it is Gunderson's burden to prove that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's errors, the result of the proceeding would have been different. Id.

With respect to the first prong of the Strickland test, there is a strong presumption that trial counsel's performance was based on sound trial strategy and falls within the broad range of reasonable professional conduct. Crosley, ¶ 55,

citing State v. Hendricks, 2003 MT 223, ¶ 7, 317 Mont. 177, 75 P.3d 1268. With respect to the second prong of the Strickland test, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome. When a defendant challenges a conviction, the defendant must show the fact finder's reasonable doubt respecting guilt could have been routed by the unprofessional errors of counsel." Crosley, 2009 MT 126, ¶ 55, quoting State v. Harris, 2001 MT 231, ¶ 19, 306 Mont. 525, 36 P.3d 372 (citation omitted).

Before reaching the merits of an ineffective assistance of counsel claim on direct appeal, this Court determines whether the allegations are properly before the Court. Hagen v. State, 1999 MT 8, ¶ 12, 293 Mont. 60, 973 P.2d 233. If ineffective assistance of counsel claims are based on facts of record, they must be raised on direct appeal. Where allegations of ineffective assistance of counsel cannot be documented from the record, those claims must be raised in a postconviction relief petition. Hagen, ¶ 12, (citations omitted).

"The test to determine if an ineffective assistance claim is properly brought on direct appeal is whether the record contains the answer as to 'why' counsel took or failed to take, action in providing a defense." State v. Upshaw, 2006 MT 341, ¶ 33, 335 Mont. 162, 153 P.3d 579, citing State v. White, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. If this Court concludes Gunderson's claims are record based, Gunderson has failed to meet his burden under Strickland.

Gunderson first argues that Kelleher should have asserted, pursuant to Mont. Code Ann. § 45-3-103(4), that he abandoned his attempt to rape Stephanie because he left her apartment without raping her. Had Kelleher done so, the State would have responded that Gunderson fled because once Stephanie turned the light on she could identify Gunderson, thus he could not complete the rape and go undetected. Further, Gunderson fled because Stephanie was screaming and fighting thereby risking that neighbors would hear and intercede. Finally, Gunderson's defense was that he had no sexual motivation in entering Stephanie's apartment. Thus, he could not abandon an offense he never intended to commit. Gunderson has failed to prove how making such an argument to the jury would have changed the outcome of the case. If anything, it would have undermined his defense that the State presented insufficient evidence to prove Attempted Sexual Intercourse Without Consent.

Gunderson next argues that defense counsel should have offered lesser included offense instructions of Sexual Assault and Criminal Trespass. Gunderson fails to set forth the evidence that would have warranted defense counsel requesting the lesser included offense instruction of Criminal Trespass. Further, Gunderson denied that he touched any of Stephanie's intimate body parts and claimed he was only there to talk with her and pass the time and had no sexual motivation to be there. His testimony, if believed, would support a complete

acquittal, not a conviction for Attempted Sexual Assault. See State v. Schmalz, 1998 MT 210, ¶ 23, 290 Mont. 420, 964 P.2d 763.

In two paragraphs, Gunderson summarily argues that trial counsel was ineffective for failing to: sufficiently investigate the case and call witnesses; impeach the victim; challenge prospective Juror Jensen for cause; object to the jury instructions defining purposely and knowingly; and to object to the court adopting Officer Boyd's conditions should the court place Gunderson within the community. As this Court has made clear, "[a] petitioner claiming ineffective assistance of counsel must ground his or her proof on facts within the record and not on conclusory allegations." Baca v. State, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948, quoting Ford v. State, 2005 MT 151, ¶ 7, 327 Mont. 378, 114 P.3d 244.

Gunderson also failed to comply with Mont. R. App. P. 12(f), which requires the parties cite to relevant authorities and statutes in support of their legal arguments on appeal. This court has repeatedly held that is not its obligation to conduct legal research on behalf of a party or to develop legal analysis that might support a party's position. State v. Cybulski, 2009 MT 70, ¶ 13, 349 Mont. 429, 204 P.3d 7. Even assuming the Court is willing to overlook the generality of Gunderson's complaints and his lack of legal analysis, Gunderson has failed to

prove prejudice. There is no merit to Gunderson's ineffective assistance of counsel claims.

VI. THE DISTRICT COURT PROPERLY DENIED GUNDERSON'S MOTION FOR A MISTRIAL.

Gunderson theorizes that when Juror Thorson stated that he worked at the Yellowstone County Detention Facility and later affirmed that he knew Gunderson, this created a negative inference about Gunderson. Gunderson surmises that Thorson's answers tainted the jury panel, and therefore the court should have granted his motion for a mistrial. "The decision of a district court judge as to the impartiality of a jury should not be set aside unless there is clear abuse of discretion." State v. Wright, 2002 MT 275, ¶ 8, 312 Mont. 352, 59 P.3d 432.

Once again, Gunderson has failed to develop legal analysis as to how the district court abused its discretion, and this Court should therefore decline to consider Gunderson's claim. Cybulski, 2009 MT 70, ¶ 13. Should this Court excuse Gunderson's lack of legal analysis, he still cannot prevail.

Thorson never stated that he knew Gunderson because Gunderson was incarcerated. Further, he specifically stated that knowing Gunderson did not in any way affect his ability to be fair and impartial. Thorson did not implicitly or explicitly impart any negativity about Gunderson that would taint the jury panel. Further, in any criminal trial, a prospective juror is certainly aware that since a

defendant is charged with a crime, he was at one point arrested for that crime, thereby making it likely that the defendant may have spent some time, whether hours, days or months, at a detention facility. In the instant case, Gunderson volunteered during his testimony that he had been in jail for seven months.

The circumstances in this case are akin to, although more innocuous than, the circumstances in Wright, wherein a prospective juror indicated he knew the defendant both as a coworker and because he was called upon to sit on another jury involving the defendant. When asked, the prospective juror indicated that he could probably not judge the case fairly. Wright, 2002 MT 275, ¶ 4. In Wright, this Court affirmed the district court's denial of the defendant's request for a mistrial. Wright, ¶ 17. In the instant case, Juror Thorson's answers did not reveal anything negative about Gunderson or create any bias towards Gunderson, and the district court properly exercised its discretion when it denied Gunderson's motion for a mistrial.

VII. THIS COURT SHOULD DECLINE TO REVIEW GUNDERSON'S CLAIM OF JUROR BIAS.

Gunderson claims, for the first time on appeal, that Juror Jensen demonstrated bias against him, and the court should have removed her for cause. This Court generally will not address issues raised for the first time on appeal. State v. Longfellow, 2008 MT 343, ¶ 19, 346 Mont. 286, 194 P.3d 694. The Court

only recognizes an exception to this rule where an appellant invokes the plain error doctrine. Under the plain error doctrine, it is within this Court's discretion to review claimed errors not preserved for appeal that implicate a criminal defendant's fundamental constitutional rights, and when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process. State v. Hayden, 2008 MT 274, ¶ 17, 345 Mont. 252, 190 P.3d 1091, citing State v. Daniels, 2003 MT 247, ¶ 20, 317 Mont. 331, 77 P.3d 224. The Court will only use plain error review sparingly on a case-by-case basis. Hayden, ¶ 17, citing State v. Rosling, 2008 MT 62, ¶ 77, 342 Mont. 1, 180 P.3d 1102.

The doctrine establishes a two-part test, with the burden on the criminal defendant to meet both parts. State v. Whipple, 2001 MT 16, ¶ 32, 304 Mont. 118, 19 P.3d 228. A mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine. Whipple, ¶ 33; State v. Rovin, 2009 MT 16, ¶ 29, 349 Mont. 57, 201 P.3d 780. Gunderson has made a "mere assertion" that plain error review is appropriate and has failed to meet his burden.

Further, a "fundamental aspect of 'plain error' is that the alleged error indeed must be 'plain.'" State v. Wagner, 2009 MT 256, ¶ 21, 352 Mont. 1,

215 P.3d 20, quoting State v. Godfrey, 2004 MT 197, ¶ 38, 322 Mont. 254, 95 P.3d 166. A review the transcript excerpt of Jensen's answers indicate that, while she may have expressed some initial concern about remaining impartial, she truly believed she could impartially weigh the evidence and serve fairly. The district court was not required to remove Juror Jensen for cause. State v. Robinson, 2008 MT 34, ¶ 10, 341 Mont. 300, 177 P.3d 488.

VIII. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY.

This Court reviews jury instructions to determine whether the instructions, taken as a whole, fully and fairly instruct the jury as to the applicable law and whether the district court abused its discretion in instructing the jury. State v. Nick, 2009 MT 174, ¶ 8, 350 Mont. 533, 208 P.3d 864 (citations omitted). If the instructions are erroneous in some aspect, the mistake must prejudicially affect the defendant's substantial rights in order to constitute reversible error. Id.

A. This Court Should Not Conduct Plain Error Review of the Purposely and Knowingly Jury Instructions.

Gunderson did not object to the court's instructions defining purposely and knowingly, but asks the Court to review the instructions for the first time on appeal pursuant to the plain error doctrine. Generally, this Court will not review jury instructions where the party asserting error did not object to the instructions at the

time they were proposed. See Mont. Code Ann. § 46-16-410(3); State v. Earl, 2003 MT 158, ¶ 23, 316 Mont. 263, 71 P.3d 1201.

Gunderson has offered no analysis of why plain error review is appropriate. A mere assertion that constitutional rights are implicated or that failure to review the claimed error may result in a manifest miscarriage of justice is insufficient to implicate the plain error doctrine. Whipple, ¶ 33; State v. Rovin, 2009 MT 16, ¶ 29.

B. The District Court Properly Refused Gunderson's Loss of Evidence Instruction.

Gunderson argues the district court's failure to give his "missing evidence" instruction, (App. C.), violated his right to due process.[1] In district court, Gunderson argued the police had a duty to collect Stephanie's bedding and to insist that she go to the hospital and undergo a rape examination.[2] (D.C. Doc. 51, Tr. at 454-58.) For the first time on appeal, Gunderson argues his proposed instruction should have been given because the State failed to seize the victim's underwear or swab her neck for Gunderson's DNA. Since Gunderson has changed his theory on appeal regarding why the court should have given the instruction, this Court should

[1] As Gunderson notes the issue of whether the Montana Due Process Clause demands that law enforcement gather and preserve evidence with no apparent exculpatory value has been raised in State v. Taylor, No. DA 09-0246. Due to space constraints, the State stands by the legal arguments it made in Taylor and addresses the practicalities of why such an instruction was unnecessary.

decline to consider the changed theory. State v. Adgerson, 2003 MT 284, ¶ 12, 318 Mont. 22, 78 P.3d 850.

The district court properly declined to give the instruction because Montana law does not support such an instruction. See State v. Saxton, 2003 MT 105, ¶ 32, 315 Mont. 315, 68 P.3d 721 (police officers have no affirmative duty to collect exculpatory evidence. . . ."); State v. Brown, 1999 MT 133, ¶ 24, 294 Mont. 509, 982 P.2d 468 (no law enforcement duty to assist in procuring evidence on defendant's behalf); State v. Weaver, 1998 MT 167, ¶ 54, 290 Mont. 58, 964 P.2d 713 (describing the same principle as "well settled").

The court also properly declined to give the instruction based upon Gunderson's purported reasons that the instruction was necessary. Gunderson argued that if the State had gathered the sheets, it would have shown an absence of fighting or resistance on the bed. Officer Wichman testified that he did not see any blood or other physical evidence on the bedding, so the State's own witness supported Gunderson's position. Similarly, Gunderson argued that if Stephanie had submitted to a full rape examination, the examination would have demonstrated that she had no physical injuries. Stephanie, Officer Wichman and Detective Paharick all testified that Stephanie did not have physical injuries.

[2] Gunderson raised the same issue in a Motion to Dismiss but has not appealed the lower court's denial of the motion.

Gunderson's arguments not only conflict with precedent, but show why this Court should not deviate from that precedent. Gunderson is asking that the State be penalized for not collecting evidence that had no apparent exculpatory value. Since Gunderson's DNA was on Stephanie's hand and under her nails, he clearly was inside of her apartment, and she clearly used her nails on his skin. That is affirmative evidence of his presence. But Gunderson wanted the court to instruct the jury to presume a negative and hold it against the State. For example, assuming the State had collected the bedding, and assuming there was no blood on the bedding, all this shows is there was no blood on the bedding. An initial struggle still could have easily ensued on the bed without resulting in Gunderson or the victim bleeding. See, e.g., State v. Turner, 265 Mont. 337, 350, 877 P.2d 978, 986 (1994) (lack of blood on clothing is not exculpatory). Similarly, the fact that Stephanie did not have bruises does not prove that Gunderson did not attack her.

Finally, Gunderson has failed to demonstrate how the court's refusal to give the instruction prejudicially affected his substantial rights. During closing argument, Gunderson was free to make all of his arguments to the jury about the shortcomings in the State's investigation.

The district court followed the law and should not be held in error for doing so.

C. The District Court Properly Refused Gunderson's Instruction That the Jury Should Treat His Testimony Like That of Any Other Witness.

Gunderson's proposed instruction that his testimony should be treated like that of any other witness was merely repetitive of the court's instruction 3, based on Montana Pattern Jury Instruction 1-003, which this Court affirmed in State v. Marble, 2005 MT 208, ¶¶ 23-28, 328 Mont. 223, 119 P.3d 88. Further, Gunderson has failed to comply with Mont. R. App. P. 12(f), because other than citing to the Ninth Circuit Court Model Criminal Jury Instructions he has cited no authority or offered any legal analysis to support his position, and this Court should decline to consider his claim. Cybulski, 2009 MT 70, ¶ 13.

IX. THE DISTRICT COURT HAS NO GENERAL POWER TO IMPOSE PAROLE CONDITIONS.

The district court made it clear that it never wanted Gunderson to be released from prison. Out of an abundance of caution, the court still imposed the conditions Officer Boyd recommended if the court suspended any portion of Gunderson's sentence. The State concedes that for all practical purposes the conditions imposed amount to conditions of parole, and with the exceptions of the conditions specifically authorized by statute, the court did not have authority to impose the conditions. State v. Burch, 2008 MT 118, ¶ 36, 342 Mont. 499, 182 P.3d 66.

CONCLUSION

The State respectfully requests that this Court affirm Gunderson's conviction and sentence, with the exception of the unauthorized parole conditions, or remand to give the sentencing court the opportunity to sentence Gunderson without designating him a PFO.

Respectfully submitted this 29th day of January, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
TAMMY K PLUBELL
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Ms. Taryn Stampfl Hart
Assistant Appellate Defender
139 North Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

Mr. Dennis Paxinos
Yellowstone County Attorney
P.O. Box 35025
Billings, MT 59107-5025

DATED_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 9,820, excluding certificate of service and certificate of compliance.

_____
TAMMY K PLUBELL

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0499

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DAVID W. GUNDERSON,

Defendant and Appellant.

APPENDIX
